STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 1999
v	No. 211387 Tuscola Circuit Court
JAMIE RAY BJORN, Defendant-Appellant.	LC No. 98-007280 FH

Before: Neff, P.J., and Murphy and J.B. Sullivan*, JJ.

PER CURIAM.

The victim in this case is a seven-year-old boy. Defendant was a house guest of the victim's parents at the time of the underlying incident. After socializing with the victim's parents one evening, defendant excused himself to go watch television with the victim. When the victim's mother went to check on her son, she found him sitting on defendant's lap. Both defendant's and the victim's pants were pulled down, and defendant was fondling the victim's penis. The victim's father forcibly removed defendant from the house and defendant was arrested later that night.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant as a third habitual offender, MCL 799.11; MSA 28.1083, to fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that the prosecutor violated MRE 609 when he impeached defendant with two prior convictions for receiving and concealing stolen property in excess of $100 without first notifying both the court and defendant of his intention to do so. Defendant argues that the prosecutor never made a request to impeach him, and that the court never provided any analysis on the record of the probative value of the convictions versus their prejudicial effect, or whether the admission of the prior conviction would cause defendant not to testify. Defendant asserts that he was caught by surprise

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

when he was asked about the prior

convictions, which prevented him from making an informed decision regarding whether to testify. Defendant concludes these circumstances precluded the trial judge from making a complete analysis under MRE 609(a)(2) and (b) in deciding whether the prior convictions were admissible to impeach defendant. We disagree.

MRE 609 generally provides that a witness' credibility may not be attacked by evidence that the witness has been convicted of a crime unless specific conditions within the rule are satisfied. MRE 609(a). Evidence of the prior crime must be either elicited from the witness or established by public record during cross-examination. MRE 609(a) further provides that either:

> (1) [t]he crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

The rule restricts the use of stale, defunct or juvenile convictions. MRE 609(c), (d), and (e). Subsection (b) of the rule provides that

> [f]or purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

Evidence of defendant's prior convictions was elicited from defendant while he was testifying on cross-examination. Neither party contends that defendant's prior convictions of receiving and concealing stolen property were automatically admissible under MRE 609(a)(1). Admission of the prior convictions therefore invokes the provisions of MRE 609(a)(2). Neither party disputes the fact that defendant's prior convictions contained an element of theft and were punishable by imprisonment in excess of one year. Defendant does not argue that his prior convictions are not probative of his credibility. The crux of defendant's objection is that he was not provided with notice of the prosecution's intention to impeach him with his prior convictions, and so could not make an informed decision about whether to testify at trial.

We find that defendant's legal argument has some merit. No language within MRE 609 expressly mandates that the prosecutor provide advance warning of his intention to impeach a defendant with prior convictions, but subsection (b) of the rule implies notice. MRE 609(a)(2)(B) requires the trial

judge to consider the prejudicial effect of an impeachment with prior convictions, and MRE 609(b) in turn states that a consideration of prejudicial effect should include "the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify." If defendant had received a warning that his prior convictions would be used against him were he to testify at trial, then he might have chosen not testify in order to avoid the risk that the jury would be made aware of his past transgressions. Without knowing whether the use of the prior convictions would have affected defendant's decision to testify, the trial judge could not have provided a complete analysis to weigh their prejudicial effect and determine whether the convictions were admissible. Indeed, the record contains no indication that the trial court considered this factor.

Despite the viability of defendant's legal argument, the record does contain some evidence that the prosecutor notified defense counsel of his intentions. The prosecutor indicated that he attended a pretrial conference in which he informed defense counsel that he would use defendant's prior convictions for impeachment purposes. Defendant did not dispute this fact. Because defendant received adequate notice of the prosecution's intentions, impeachment with his prior convictions was proper.

Even if the trial judge had abused his discretion in allowing the impeachment, any error would have been harmless. An error is harmless within the context of an MRE 609 ruling when there is overwhelming evidence of guilt. *People v Bartlett*, 197 Mich App 15, 20; 494 NW2d 776 (1992); *People v Hicks*, 185 Mich App 107, 111; 460 N.W.2d 569 (1990). At trial, both the victim and his mother testified concerning defendant's actions, and the victim's father testified regarding inculpatory statements made by defendant after the alleged actions took place. A state trooper testified that he performed a breathalyzer test on defendant that yielded a result of "point zero one three percent" – a blood-alcohol level inconsistent with defendant's claim that intoxication made him unaware of any interactions with the victim. Given this evidence of defendant's guilt, any error by the trial judge in allowing defendant to be impeached by his prior convictions was harmless.

II

Defendant next urges this Court to remand his case for resentencing because his fifteen to thirty year sentence was disproportionate. Defendant also claims that his prior two theft offenses belie any history of assaultive behavior. Additionally, defendant contends that the trial judge's personal feelings affected his judgment and prevented him from individually assessing defendant's case and tailoring his sentence. We reject these claims.

The proportionality of an habitual offender's sentence is reviewed under an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990); *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). The sentencing guidelines do not apply to habitual offenders, *People v Cervantes*, 448 Mich 620, 625 (Riley, J.), 630 (Cavanagh, J.); 532 NW2d 831 (1995), and may not be considered on appeal in determining an appropriate sentence for a habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). A sentence must be proportionate to the history of the offender and the seriousness of the matter for which the punishment is imposed. *Milbourn, supra* at 636.

Defendant's sentence was proportionate. Defendant was sentenced as a third habitual offender and received a sentence of fifteen to thirty years. Second-degree CSC is a felony punishable by up to fifteen years' imprisonment. MCL 750.520c(2); MSA 28.788(3)(2). Under MCL 769.11(1)(a); MSA 28.1083(1)(a), governing third felony offenders, where a felony is punishable upon a first conviction by imprisonment for a term less than life, a court "may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term."

By its terms, MCL 769.11(1)(a); MSA 28.1083(1)(a) permitted the trial judge to sentence defendant to a maximum of double the period of imprisonment for a conviction of second-degree CSC – thirty years in this case. Moreover, when a defendant's criminal history and the underlying felony indicate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). In the present case, the trial judge based the sentence on defendant's criminal history as well as the severity of the underlying felony, and we find no abuse of discretion.

Finally, the record does not support defendant's claim that the trial judge's personal feelings clouded his ability to tailor an individual and proportional sentence, given defendant's two prior convictions and the nature of the underlying felony. Furthermore, as this court has previously stated, the language used by a trial court when imposing sentence need not be tepid—sentencing is the time for comments against felonious, antisocial behavior. *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992).

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Joseph B. Sullivan